No. 80-79

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RICHARD R. KAY, - - - - - - Petitioner,

versus

BRENER HERLIH and the KENTUCKY BOARD OF ELECTIONS, - - - - - - Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

FREDERIC J. COWAN
ATTORNEY GENERAL

ANN M. SHEADEL
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)
Capitol Building
Frankfort, Kentucky 40601
(502) 564-7600
Counsel for Respondents

WESTERFIELD-DAVIES CO., 612 W. KENTUCKY—P.O. BOX 2001, LOUISVILLE, KY.

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QUESTION PRESENTED

Whether a pro se litigant is eligible for attorney's fees under 42 U.S.C. § 1988 simply because he also happens to be an attorney.

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No. 90-79

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD B. KAY, - - - - - - - *Petitioner,*

v.

BREMER EHRLER and the
KENTUCKY BOARD OF ELECTIONS, - - *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner Richard B. Kay is a resident of the State of Florida and a licensed attorney.[1] Pet. App. 3a. In October

[1]The record does not reflect in what state(s) Petitioner is a licensed attorney or whether Petitioner was admitted to practice law before the District Court for the Eastern District of Kentucky at the time of this lawsuit.

of 1978, he announced that he would seek the Democratic nomination for the office of President of the United States. *Kay* v. *Mills,* 490 F. Supp. 844, 846 (E.D. Ky. 1980).

Petitioner notified the Kentucky State Board of Elections early in 1980 of his wish to appear on the Kentucky Democratic primary ballot. *Id.* The Kentucky State Board of Elections met on April 2, 1980, to select the names of the candidates to be placed on the presidential primary ballot. *Id.* All names placed on the ballot were done so pursuant to KRS 118.580 (repealed 1982), which required that "the board shall nominate as presidential preference primary candidates all those generally advocated and nationally recognized as candidates of the political parties for the office of President of the United States." *Id.* The Board had no regulations or fixed criteria to be used in distinguishing between candidates which it determined to be "generally advocated and nationally recognized as candidates" and those which it did not. *Id.* at 847.

Petitioner's name was not placed on the ballot by the Board of Elections. *Id.* On April 14, 1980, Petitioner filed a lawsuit challenging the constitutionality of KRS 118.580. *Id.* at 847, 849. The District Court determined that the statute was void for vagueness, finding that there was no ascertainable standard by which Petitioner could determine whether or not he complied with the statute's requirements. *Id.* at 852, 853. The court ordered Petitioner's name to be placed on the ballot. *Id.* at 855.

In 1982, the Kentucky General Assembly repealed KRS 118.580. Pet. App. 3a. In 1986, it enacted KRS 118.581, which included the same statutory language as in the repealed KRS 118.580, providing that "the board shall nominate as presidential preference primary candidates all those generally advocated and nationally recognized as candidates

of the political parties for the office of President of the United States." Pet. App. 21a. In September of 1987, the Board of Elections adopted the criteria that a person who had received Federal Election Commission certification to receive federal matching funds in his/her race for President of the United States would fulfill the statutory requirement. Pet. App. 19a - 20a.

On August 10, 1987, Petitioner announced that he once again would seek the Democratic nomination for the office of President of the United States. Pet. App. 3a. In December of 1987, he wrote to the Kentucky Secretary of State,[2] asking that his name be presented to the Board of Elections at its January 8, 1988 meeting, at which time the Board would decide which candidates' names would appear on the ballot for the upcoming presidential primary. *Id.* On January 2, 1988, Petitioner was notified of the criteria that the Board would use in making this decision. Pet. App. 19a - 20a.

On January 11, 1988, Petitioner was informed that he did not qualify as a presidential preference primary candidate and that his name would not appear on the ballot. Pet. App. 20a. On January 12, 1988, Petitioner, acting pro se, filed this lawsuit, challenging KRS 118.581 as unconstitutional. Pet. App. 20a - 21a. In addition, Petitioner challenged the constitutionality of KRS 118.611, pertaining to filing fees for candidates, and sought to have the method by which members of the Board of Elections are appointed declared unconstitutional under Kentucky law. Pet. App. 23a, 26a. Petitioner also moved for a temporary restrain-

[2]At the time of this letter, the Kentucky Secretary of State was Drexel R. Davis. Pet. App. 19a. In January, 1988, Secretary of State Davis was succeeded by Secretary of State Bremer Ehrler. Pet. App. 2a and n.1.

ing order and a preliminary injunction. Pet. App. 1a. Petitioner brought his action under the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1981, 1983, 1985, and 1988. Pet. App. 1a.

Upon discovery that Petitioner had been placed on the Kentucky presidential preference primary ballot in 1980, the Board of Elections voted to place Petitioner's name on the ballot for the 1988 presidential preference primary. Pet. App. 20a. Petitioner was notified of that decision on January 13, 1988, *id.*, which rendered Petitioner's request for injunctive relief moot. Pet. App. 2a.

Both Petitioner and Respondents moved for summary judgment. Pet. App. 2a. The district court referred the matter to a magistrate, who filed a Report and Recommendation on September 13, 1988. Pet. App. 2a, 19a - 28a. In this Report and Recommendation, the magistrate recommended: (1) that KRS 118.581 and 118.611 be declared unconstitutional; (2) that Petitioner's challenge under Kentucky law of the method by which members of the Board of Elections are appointed be dismissed due to lack of subject-matter jurisdiction; (3) that pursuant to 42 U.S.C. § 1988, Petitioner be awarded litigation costs for his claims against KRS 118.581 and KRS 118.611 but not for that part of the action over which the court has no jurisdiction; and (4) that Petitioner not be awarded attorney's fees pursuant to 42 U.S.C. § 1988. Pet. App. 21a - 28a. As to his recommendation regarding attorney's fees, the magistrate reasoned that the issue was controlled by the Sixth Circuit's decision in *Falcone* v. *Internal Revenue Service*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 446 U.S. 908 (1984), which held that pro se litigants who are attorneys are not entitled to attorney's fees under the Freedom of

Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). Pet. App. 27a - 28a.

The district court, after considering *de novo* the objections filed to the Magistrate's Report and Recommendation by both Petitioner and Respondents, concluded that the Report and Recommendation was "correct in all respects" and adopted it as the findings of fact and conclusions of law of the court. Pet. App. 12a, 16a.[3]

The court made additional findings of fact and conclusions of law regarding the objections to the Magistrate's Report and Recommendation filed by Petitioner and Respondents. First, the court denied Petitioner's request to certify the question of the constitutionality of the composition of the Board of Elections to the Kentucky Supreme Court, based on the court's determination that the question was not one which was appropriate for certification. Pet. App. 12a - 14a. Second, the court disallowed Petitioner's expenses in traveling to Kentucky to file pleadings, based on the court's determination that it was unnecessary for Petitioner to file his pleadings by any other method than mailing. Pet. App. 14a - 16a. Third, the court rejected Petitioner's objection to the recommendation that Petitioner was not entitled to attorney's fees because he was a pro se litigant, stating that "[t]he Magistrate's analysis and conclusion on this issue is correct in all respects and the court hereby adopts same." Pet. App. 16a.

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[3]The 1990 Kentucky Legislature amended KRS 118.581 to state, in pertinent part, that "the board shall nominate as presidential preference primary candidates all those candidates of the political parties for the office of President of the United States who have qualified for matching federal campaign funds." KRS 118.581, as amended.

Petitioner appealed the denial of attorney's fees to the Sixth Circuit Court of Appeals, which affirmed the district court's judgment in a divided decision. Pet. App. 1a - 11a. The court agreed that Petitioner should not receive attorney's fees based upon its rejection in *Falcone* v. *Internal Revenue Service* of "the proposition that opportunity costs constitute actual pecuniary losses for which a *pro se* attorney deserves compensation." Pet. App. 8a. The court determined that, because Petitioner had not incurred any expenses for legal representation, he could not recover attorney's fees under 42 U.S.C. § 1988. Pet. App. 8a. The court decided that the plain language of a statutory provision for attorney's fees "assumes a paying relationship between an attorney and a client." Pet. App. 8a.

In addition, the court determined that one of the major objectives of the statutory provision for attorney's fees is to provide for the filtering of meritless claims by objective attorneys; such an objective is frustrated when an attorney represents himself. Pet. App. 8a. Moreover, the court stated that "the fact that the public might benefit from a *pro se* attorney's actions did not make him more deserving of fees than a *pro se* non-attorney plaintiff." Pet. App. 8a.

Judge Jones dissented. Pet. App. 9a - 11a. In his opinion, the statutory purposes underlying the Freedom of Information Act and supporting the rationale of *Falcone* "are not present to the same extent, if at all, under section 1988." Pet App. 11a. Accordingly, he stated that he would allow Petitioner to recover attorney's fees "equivalent to the opportunity cost of handling other litigation." Pet. App. 11a.

SUMMARY OF ARGUMENT

The language of 42 U.S.C. § 1988 indicates that pro se litigants are ineligible for attorney's fees, whether or not those pro se litigants are attorneys. Indeed, the definition of the term "attorney's fee" itself ("Charge to client for services performed . . .", Black's Law Dictionary 614 [6th ed. 1990]) presupposes the existence of an attorney who is retained to represent the interests of a client. A person who receives attorney's fees does so because of work that he has done as an attorney on behalf of another, his client. On the other hand, a pro se litigant, whether or not an attorney, acts for himself; he cannot qualify for an attorney's fee, because he has done no work as an attorney on behalf of another who is his client. In fact, the phrases "pro se" and "attorney's fees" have such opposite meanings as to be mutually exclusive.

The fact that a pro se litigant can label himself as an attorney does not change this result. In reality, a pro se litigant who can label himself as an attorney is no different than a pro se litigant who cannot label himself as an attorney; neither one is required to be admitted to practice law to appear before the court in a civil rights action, because each is representing only himself.

The language of 42 U.S.C. § 1988 indicates that a fee that is requested under that statute will qualify as an attorney's fee only if it constitutes a charge by an attorney for services that the attorney performed for his client. While the amount that is actually charged to a client by an attorney should not be the factor that decides whether a requested fee qualifies as an attorney's fee, the existence of an attorney-client relationship that would authorize a

charge or payment for services rendered should be the deciding factor in making such a determination.

The legislative history of 42 U.S.C. § 1988 makes it clear that Congress had no intent to make pro se litigants eligible for attorney's fees. Congress' main concern in enacting this statutory provision was with citizens who might be unable to assert their civil rights because they could not afford to hire attorneys to represent them in court. Thus, Congress' intent in enacting the statute was to help provide the means by which citizens would be able to retain attorneys to represent them in civil rights actions.

Congress made no mention of compensating litigants who represent themselves in civil rights cases in the legislative history of 42 U.S.C. § 1988. Although Petitioner attempts to create such a history by citing the fact that Congress was concerned with organizational parties being eligible for attorney's fees, the organizational parties with which Congress was concerned were all represented by counsel. Thus, these organizations were part of an attorney-client relationship, the essential requirement for determining eligibility for attorney's fees. None of these parties was comparable to a pro se litigant.

Denying attorney's fees to pro se litigants who are attorneys in no way undermines Congress' intent to foster private enforcement actions. Rather, it simply places citizens who happen to be attorneys in the same position as all other citizens, who are encouraged by 42 U.S.C. § 1988 to vindicate their civil rights by retaining attorneys to represent them in their civil rights actions. Thus, Congress' intent to foster private enforcement actions is fully met in the same way for all citizens.

No justification exists to create a distinction between pro se litigants who are attorneys and pro se litigants who

are not attorneys in determining eligibility for attorney's fees under 42 U.S.C. § 1988. All pro se litigants are in the same position at the time they request attorney's fees, *i.e.*, they have prevailed in their civil rights lawsuits after expending considerable time in vindicating their rights. They all may have lost business opportunities due to time spent on their lawsuits and away from their businesses. In addition, they all may have lacked the objectivity and detachment in proceeding with their lawsuits that would have existed if they had retained counsel to represent them. Moreover, they all may have uncovered serious constitutional violations.

In sum, the statutory language, the legislative history, and policy reasons support the conclusion that pro se litigants who happen to be attorneys are not eligible for attorney's fees under 42 U.S.C. § 1988. The decision below should be affirmed.

ARGUMENT

I. THE LANGUAGE OF 42 U.S.C. § 1988 DOES NOT INCLUDE PRO SE LITIGANTS IN THE GROUP OF PREVAILING PARTIES THAT ARE ELIGIBLE FOR ATTORNEY'S FEES.

The lower courts that have considered the question have uniformly agreed that a pro se litigant who is not an attorney is not eligible for an award of attorney's fees under 42 U.S.C. § 1988. *See, e.g., Gonzalez* v. *Kangas*, 814 F.2d 1411 (9th Cir. 1987); *Smith* v. *DeBartoli*, 769 F.2d 451 (7th Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986); *Redding* v. *Fairman*, 717 F.2d 1105 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Turman* v. *Tuttle*, 711 F.2d 148 (10th Cir. 1983); *Owens-El* v. *Robinson*, 694 F.2d 941 (3rd Cir. 1982); *Pitts* v. *Vaughn*, 679 F.2d 311 (3rd Cir. 1982); *Wright* v. *Crowell*, 674 F.2d 521 (6th Cir. 1982); *Cofield* v. *City of*

Atlanta, 648 F.2d 986 (5th Cir. 1981); *Lovell* v. *Snow*, 637 F.2d 170 (1st Cir. 1981); *Rheuark* v. *Shaw*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *Davis* v. *Parratt*, 608 F.2d 717 (8th Cir. 1979); *Williams* v. *Sumner*, 648 F. Supp. 510 (D. Nev. 1986); *Peniman* v. *Cartwright*, 550 F. Supp. 1302 (S.D. Iowa 1982); *Grooms* v. *Snyder*, 474 F. Supp. 380 (N.D. Ind. 1979).[4]

Some courts, including the Sixth Circuit Court of Appeals in the instant case, have applied this general rule to hold that a pro se litigant who is an attorney is not eligible for an award of attorney's fees under 42 U.S.C. § 1988. *See, e.g., Levine v. Heffernan*, 691 F. Supp. 173 (W.D. Wis.); *Lawrence* v. *Staats*, 586 F. Supp. 1375 (D.D.C. 1984).[5]

[4]In examining other federal statutory provisions that also allow for attorney's fees, courts generally have agreed that a pro se litigant who is not an attorney is not eligible for an award of attorney's fees. *See, e.g., Nackel* v. *Dept. of Transportation*, 845 F.2d 976 (Fed. Cir. 1988) (Back Pay Act, 5 U.S.C. § 5596, and Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)); *Merrell* v. *Block*, 809 F.2d 639 (9th Cir. 1987) (Equal Access to Justice Act); *Carter* v. *Veterans Administration*, 780 F.2d 1479 (9th Cir. 1986) (Freedom of Information Act, 5 U.S.C. § 522(a)(4)(E)); *Crooker* v. *Environmental Protection Agency*, 763 F.2d 16 (1st Cir. 1985) (Equal Access to Justice Act); *Cunningham* v. *Federal Bureau of Investigation*, 664 F.2d 383 (3rd Cir. 1981) (Freedom of Information Act); *Hannon* v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976) (Truth in Lending Act, 15 U.S.C. § 1640(a)(3)). *Contra Cox* v. *United States Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979) (Freedom of Information Act).

[5]Some courts also have held that a pro se litigant who is an attorney is not eligible for an award of attorney's fees under other federal statutory provisions that allow for attorney's fees. *See, e.g., Aronson* v. *United States Department of Housing and Urban Development*, 866 F.2d 1 (1st Cir. 1989) (Freedom of Information Act); *United States* v. *McPherson*, 840 F.2d 244 (4th

(Continued on next page.)

Other courts have refused to apply this general rule in such circumstances and have held that a pro se litigant who is an attorney is eligible for an award of attorney's fees under 42 U.S.C. § 1988. *Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1129 (1986); *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Shakman v. Democratic Organization of Cook County*, 634 F. Supp. 895 (N.D. Ill. 1986); *Lanasa v. City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985); *Rybicki v. State Board of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984).[6]

Interpreting the meaning of 42 U.S.C. § 1988, as in all cases of statutory construction, must begin with the language of the statute itself. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982). When the statutory language is examined, it becomes clear that those courts that

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Cir. 1988) (Internal Revenue Code, 26 U.S.C. § 7430); *Falcone* v. *Internal Revenue Service*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984) (Freedom of Information Act); *White* v. *Arlen Realty & Development Corp.*, 614 F.2d 387 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980) (Truth in Lending Act); *Mayock* v. *Immigration and Naturalization Service*, 736 F. Supp. 1561 (N.D. Cal. 1990) (Freedom of Information Act).

[6]Some courts also have held that a pro se litigant who is an attorney is eligible for an award of attorney's fees under other federal statutory provisions that allow for attorney's fees. *See, e.g., Jones* v. *Lujan*, 883 F.2d 1031 (D.C. Cir. 1989) (Equal Access to Justice Act); *Cazalas* v. *United States Department of Justice*, 709 F.2d 1951 (5th Cir. 1983) (Freedom of Information Act); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977) (Freedom of Information Act).

State courts that have considered the question of whether a pro se litigant who is an attorney is eligible for an award of attorney's fees under state law are split on this issue. *See Weaver* v. *Laub*, 574 P.2d 609, 612 n.4 (Okla. 1978) and cases cited therein.

have held that pro se litigants are ineligible for attorney's fees are correct, whether or not those pro se litigants are attorneys.

42 U.S.C. § 1988 provides that in certain federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." By the plain language of the statute, the court in a federal civil rights action is given the limited discretion to allow (1) an attorney's fee, (2) that is reasonable, and (3) that is awarded to the prevailing party (other than the United States). At issue in this case is the meaning that should be given to the term "attorney's fee."

Petitioner concedes that the term "attorney's fee" should exclude pro se litigants who are not attorneys from eligibility for attorney's fees, because that language requires the involvement of a licensed attorney. Pet. Brief 9 - 10 n.4. Petitioner argues, however, that the "involvement" required by the statute is that service be provided by an attorney, which is accomplished, he says, when a litigant who is an attorney proceeds pro se in a civil rights lawsuit. *Id.* at 9 - 10.

This position fails to consider the clear meaning of the term "attorney's fee." Black's Law Dictionary defines "attorney fees" as: "Charge to client for services performed (*e.g.* hourly fee, flat fee, contingency fee)." Black's Law Dictionary 614 (6th ed. 1990). This definition presupposes the existence of two separate entities, one of which is an attorney and one of which is the attorney's client. Indeed, the word "attorney" is generally defined "in terms of someone who acts for *another*, someone who is employed as an agent to represent *another*, someone who acts at the appointment of *another*." *Duncan v. Poythress*, 777 F.2d

1508, 1518 and definitions at 1519 - 1521 (11th Cir. 1985) (Roney, J., dissenting) (emphasis in original), *cert. denied*, 475 U.S. 1129 (1986).

On the other hand, a pro se litigant, whether or not an attorney, acts for himself. In fact, the term "pro se" means "[a]ppearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." Black's Law Dictionary 1221 (6th ed. 1990).

The phrases "pro se" and "attorney's fees" have such opposite meanings as to be mutually exclusive. A person who is a pro se litigant acts for himself. A person who receives attorney's fees does so because of work that he has done as an attorney on behalf of another, his client. Accordingly, a pro se litigant, whether or not he is an attorney, cannot qualify for an "attorney's fee," because he has done no work as an attorney on behalf of another who is his client. *See, e.g., Jones v. Lujan*, 883 F.2d 1031, 1037 (D.C. Cir. 1989) (Silberman, J., concurring) (interpreting the phrase "attorney's fees" in the Equal Access to Justice Act as necessarily referring to a lawyer representing another person "since we do not describe the costs an individual incurs as 'fees' he charges himself"); *Merrell v. Block*, 809 F.2d 639, 642 (9th Cir. 1987) (interpreting the phrase "attorney's fees" in the Equal Access to Justice Act as indicating that a person must retain an attorney to qualify for an attorney's fee award).

Petitioner's position also is faulty because it confuses the *label* of attorney with the *action* that is taken as an attorney. As we now most commonly use the word "attorney," it means "attorney at law," which is defined as a "[p]erson admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients. . . ." Black's Law Dictionary 128 (6th

ed. 1990). Thus, a person who is admitted to practice law will receive the label of "attorney"; that label authorizes him to perform legal functions for clients. Until he performs such a legal function for a client, however, he is not acting as an attorney. In other words, the only thing that differentiates an attorney from a non-attorney when it comes to conducting legal matters is the attorney's authorization to represent another person. A pro se litigant who can label himself as an attorney is no different than a pro se litigant who cannot label himself as an attorney when it comes to conducting legal matters for themselves in a civil rights action; neither one is required to be admitted to practice law to appear before the court in such an action, because each is representing only himself. A pro se litigant who is an attorney may be able to use the attorney label, but he is not acting as an attorney in such litigation. Indeed, he is acting in the same way as all other pro se litigants, *i.e.*, on his own behalf.[7]

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[7]The problem with Petitioner's position is emphasized by the fact that Petitioner fails to offer a definition for the word "attorney." If, as Petitioner proposes, a pro se litigant who happens to be able to use the label "attorney" is eligible for attorney's fees, which pro se litigants will qualify for such an award? Will this group of pro se litigants be limited to those who are "licensed" attorneys, as Petitioner appears to suggest? Pet. Brief 9 - 10 n. 4. If so, will this group include attorneys who are licensed to practice anywhere in the United States (or world), or will it be limited to those who are licensed to practice in the state in which the court sits? Will this group include attorneys who are not admitted to practice before the court, or will it be limited to those who have been so admitted?

Of course, when a litigant proceeds pro se, he is acting as a litigant, not as an attorney, and does not need to be licensed or admitted to practice in order to pursue his civil rights claim.

Petitioner appears to argue that his position is correct, and that pro se litigants who are attorneys should be eligible for attorney's fees, because the Sixth Circuit incorrectly concluded that a fee award is appropriate only where there is a paying relationship between an attorney and a client. Pet. Brief 10 - 11. The focus in examining such a standard, however, should not be on the word "paying" as indicating an actual payment or charge made for services rendered by the attorney to his client. Rather, the focus should be on the existence of an attorney-client relationship that would *authorize* a charge or payment for services rendered. *See Jones* v. *Lujan*, 883 F.2d at 1037 (Silberman, J., concurring).

Blum v. *Stenson*, 465 U.S. 886 (1984), is not to the contrary. In that case, this Court decided that "reasonable fees" under 42 U.S.C. § 1988 "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Id.* at 896 (footnote omitted). Accordingly, the actual paying relationship between an attorney and his client is irrelevant to determining what "reasonable" fees should be paid as attorney's fees under 42 U.S.C. § 1988.

This decision, however, clearly presupposes the existence of an attorney-client relationship between the plaintiff and the private or non-profit counsel that represents the plaintiff. Thus, while the amount that is actually charged to a client by an attorney should not be the factor that decides whether a requested fee qualifies as an "attorney's fee" under 42 U.S.C. § 1988, the existence of an attorney-client relationship that would authorize a charge or

payment for services rendered should be the deciding factor in making such a determination.[8]

In sum, the use of the term "attorney's fee" in 42 U.S.C. § 1988 presupposes the existence of an attorney who has been retained to represent a client. Accordingly, a fee that is requested under that statute will qualify as an attorney's fee only if it constitutes a charge by an attorney for services that the attorney performed for that client. A pro se litigant, whether or not an attorney, is appearing for himself; he has no attorney-client relationship with an attorney and, therefore, there is no attorney to request or to receive attorney's fees for services that the attorney performed for him. Therefore, a pro se litigant is ineligible for attorney's fees under 42 U.S.C. § 1988.

II. THE LEGISLATIVE HISTORY OF 42 U.S.C. § 1988 MAKES IT CLEAR THAT CONGRESS HAD NO INTENT TO MAKE PRO SE LITIGANTS ELIGIBLE FOR ATTORNEY'S FEES.

In attempting to determine the meaning of the term "attorney's fee" in 42 U.S.C. § 1988, it is helpful "'to re-

[8]Petitioner also is incorrect in his argument (Pet. Brief 11 - 12) that his position should be adopted because of this Court's ruling in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), which held "that one who succeeds in obtaining an injunction under [Title II of the Civil Rights Act of 1964] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. Such a presumption in favor of awarding fees applies only *after* a plaintiff has satisfied the threshold requirements of the statute, *i.e.*, that the plaintiff prevailed, that the fees requested are attorney's fees, and that the fees requested are reasonable. In the instant case, the determination at issue is the threshold question of whether the requested fees are, in fact, "attorney's fees." The presumption in favor of awarding fees will apply only if this court decides that the requested fees are "attorney's fees."

member that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" *Watt* v. *State of Alaska*, 451 U.S. 259, 266 n. 9 (1981), *quoting Cabell* v. *Markham*, 148 F.2d 737, 739 (2nd Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). The discovery of the purpose of 42 U.S.C. § 1988 indicates that Congress had no intent to make pro se litigants eligible for attorney's fees.

In enacting 42 U.S.C. § 1988, Congress' main concern was with citizens who might be unable to assert their civil rights because they could not afford to hire attorneys to represent them in court. That concern was stated in the Senate Report that accompanied the bill that was ultimately enacted as 42 U.S.C. § 1988:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 5908, 5910.

That concern also was expressed in the House Report that accompanied a House Bill that was similar in wording to the enacted Senate bill:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the

> judicial process where their grievances can be resolved according to law.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).[9]

Clearly, Congress' intent in enacting 42 U.S.C. § 1988 was to help provide the means by which citizens would be able to retain attorneys to represent them in civil rights actions. The language in this legislative history "presupposes a relationship of attorney and client." *Davis* v. *Parratt,* 608 F.2d 717, 718 (8th Cir. 1979). Indeed, "the purpose of section 1988 is not to compensate a worthy advocate but to enable and encourage a wronged person to retain a lawyer." *Cofield* v. *City of Atlanta,* 648 F.2d 986, 988 (5th Cir. 1981). In other words, this congressional language "is intended primarily to encourage lawyers to take on the representation of plaintiffs suing to vindicate their civil rights." *Levine* v. *Heffernan,* 691 F. Supp. at 175.

Congress made no mention of compensating litigants who represent themselves in civil rights cases in the legislative history of 42 U.S.C. § 1988. Petitioner argues that Congress envisioned that an organization that represents itself would be entitled to attorney's fees, and that if this is true for an organization it also ought to apply to a litigant who represents himself. Pet. Brief 15. Petitioner bases this argument on language in the relevant House

[9] H.R. 15460 stated:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5 (1976).

Report and on the fact that 42 U.S.C. § 1988 was enacted in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 421 U.S. 240 (1975). Each of Petitioner's interpretations is faulty and will be addressed in turn.

The language in the House Report on which Petitioner relies states:

> [A] prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 n.16 (citations omitted). This language, however, does not even consider the manner in which an organization that is a party is represented. In fact, the one case cited in the House Report in support of this proposition concerns a non-profit organization, Puerto Rican Legal Defense and Education Fund, Inc., that was represented by legal counsel. *Torres* v. *Sachs,* 69 F.R.D. 343 (S.D. N.Y. 1975), *aff'd,* 538 F.2d 10 (2d Cir. 1976). This organization was not comparable to a pro se litigant, because it was the client in an attorney-client relationship that was established for this lawsuit. The existence of such a relationship, an essential requirement for determining eligibility for attorney's fees, does not support Petitioner's position.

Neither is Petitioner's position supported by the fact that Congress enacted 42 U.S.C. § 1988 in response to this Court's decision in *Alyeska,* which held that federal courts could not award attorney's fees to a prevailing party without congressional authorization. *Alyeska,* 421 U.S. at 269. Petitioner argues that, "[b]y legislatively endorsing the type of suit brought in *Alyeska,* Congress intended to make fees broadly available to organizational litigants, without

regard to whether the organization represented itself or was retained for purposes of litigation." Pet. Brief 15. In the type of suit brought in *Alyeska*, however, the parties seeking attorney's fees were organizations that were represented either by in-house counsel or by pro bono attorneys. *Id.* at 14. Thus, each of these parties was the client in an attorney-client relationship, an essential requirement for determining eligibility for attorney's fees. None of these parties was comparable to a pro se litigant.[10]

Petitioner also argues that "[d]enying fees to pro se attorneys would undercut Congress' intent to foster private enforcement actions." Pet. Brief 19 (footnote omitted). Such a denial of attorney's fees, however, simply places citizens who happen to be attorneys in the same position as all other citizens. Indeed, all citizens, whether or not they are attorneys, are encouraged by 42 U.S.C. § 1988 to vindicate their civil rights by retaining attorneys to represent them in their civil rights actions. It is in this way that Congress' intent to foster private enforcement actions is fully met in the same way for all citizens.

In sum, the clearly stated congressional intent in providing for attorney's fees in 42 U.S.C. § 1988 is to give victims of civil rights violations access to the judicial process by enabling them to retain attorneys. There is no congressional intent to provide attorney's fees to anyone other than an attorney who has been retained to represent another person who was a victim of a civil rights violation. A pro se litigant, whether an attorney or a non-attorney,

[10]Contrary to ~~Petitioner~~'s suggestion, an organization is not proceeding pro se when it is represented by in-house counsel. The organization has retained an attorney (in-house counsel) to represent it and has established an attorney-client relationship with that attorney.

has not been retained to represent such a victim and therefore is not eligible for attorney's fees.[11]

III. NO JUSTIFICATION EXISTS TO CREATE A DISTINCTION BETWEEN PRO SE LITIGANTS WHO ARE ATTORNEYS AND PRO SE LITIGANTS WHO ARE NOT ATTORNEYS IN DETERMINING ELIGIBILITY FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

As discussed above, the language of 42 U.S.C. § 1988 and the legistlative history treat all pro se litigants in the same way, indicating that they are not eligible for attorney's fees. There is no justification for creating a differentiation between pro se litigants who are attorneys and those who are not.

Indeed, all pro se litigants are in the same position at the time they request attorney's fees under 42 U.S.C. § 1988, *i.e.*, they have prevailed in their civil rights lawsuits after expending what may have been considerable time in vindicating their rights.[12] They all may have lost business opportunities due to time spent on their lawsuits and away from their businesses. In addition, they all may have lacked the objectivity and detachment in proceeding with their law-

[11]This result does not undermine the deterrence value of fee awards, as alleged by Petitioner (Pet. Brief 20), because Congress expressed no intention of having fee awards made under 42 U.S.C. § 1988 used as a deterrent. Citizens who wish to use such fees for their deterrent value may retain attorneys to represent them. However, the award of attorney's fees under 42 U.S.C. § 1988 is not meant as a punitive measure. *See Lanasa* v. *City of New Orleans*, 619 F. Supp. at 42 n.4.

[12]Of course, even if these litigants had hired attorneys to represent them, they would have needed to spend a good deal of time working on their lawsuits. Such is the nature of litigation. *See, e.g., Cunningham* v. *Federal Bureau of Investigation*, 684 F.2d at 386.

suits that would have existed if they had retained counsel to represent them. *See, e.g., Aronson* v. *United States Department of Housing and Urban Development,* 866 F.2d 1, 5 (1st Cir. 1989); *White* v. *Arlen Realty & Development Corp.,* 614 F.2d 387, 388 (4th Cir.), *cert. denied,* 477 U.S. 923 (1980).

Petitioner appears to argue that a distinction should be made between pro se litigants who are attorneys and pro se litigants who are not attorneys, because "[p]ro se attorneys have, in fact, made important contributions toward private enforcement efforts, uncovering serious constitutional violations." Pet. Brief 19. Such a distinction is not valid, however, because pro se litigants who are not attorneys may also uncover serious constitutional violations. Indeed, a plaintiff must have prevailed in his civil rights claim for the question of eligibility for attorney's fees even to be raised. No justifiable distinction can be made between pro se litigants who are attorneys and those who are not.

In sum, the statutory language, the legislative history, and policy reasons support the decision that pro se litigants who happen to be attorneys are not eligible for attorney's fees under 42 U.S.C. § 1988.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

FREDERIC J. COWAN
Attorney General

ANN M. SHEADEL
Assistant Attorney General
(Counsel of Record)
Capitol Building
Frankfort, Kentucky 40601
(502) 564-7600

Counsel for Respondents

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